Supreme Court, U.S.
FILED

No.

In The

Supreme Court of the United States

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October Term, 1999

UNITED STATES BAKERY, INC., dba SNYDER'S BAKERY, INC., a foreign corporation,

Petitioner,

v.

JOHN SCHNEIDER, KEVIN CRAWFORD, ROY R. CLARK, MIKE EDGAR, LEE HENDRICKSON, MARK C. JORDAN, RON LAMP, TERRY MOORE, KEITH NONENMACHER, CAL PAULUS, TOM STONE, JOE WURTZ and ROBERT J. FILLIUM, individually and on behalf of the Class,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Washington (Division III)

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

State wage-and-hour laws typically exempt "outside salesmen" from their coverage. A union decides in collective bargaining that certain jobs are exempt "outside salesmen," and bargains for them to be paid a weekly salary plus sales commissions. Some of the affected workers disagree, contending they don't meet the definition of "outside salesmen," and are dissatisfied at not receiving overtime pay. They nevertheless do not file a grievance or invoke arbitration as provided in the collective bargaining agreement. Instead, they sue the employer in state court for overtime pursuant to the state wage-and-hour statute, and demand an injunction against their collectively bargained compensation system.

The questions presented are:

1. Does the Labor Management Relations Act pre-empt their state law challenge to the collective bargaining agreement, at least where they have failed to resort first to the grievance and arbitration procedure?

2. Where the collective bargaining agreement is relevant evidence in determining whether the plaintiffs meet the statutory definition of exempt "outside salesmen," does the Labor Management Relations Act pre-empt the state court from interpreting the collective bargaining agreement and require resort to arbitration for that purpose instead?

3. If so, may the state court avoid federal pre-emption and arbitration by refusing to consider evidence of the collective bargaining agreement, where doing so would deprive the unionized employer of its best evidence and thereby cripple its defense?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

CORPORATE DISCLOSURE

Petitioner United States Bakery, Inc. is privately owned and has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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United States Bakery, Inc., dba Snyder's Bakery, Inc., (U.S. Bakery) respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of Washington.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition. It is reported at 95 Wash. App. 399, 976 P.2d 134 (1999).

JURISDICTION

The Washington Court of Appeals rendered its opinion on March 30, 1999. A timely petition for rehearing was denied on May 4, 1999. A timely petition for review to the Washington Supreme Court was denied on November 2, 1999. On that date the decision below became final (Appendix F). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

Although the Washington Court of Appeals remanded the case to the trial court for further proceedings, its decision was nevertheless final for purposes of 28 U.S.C. § 1257. *Belknap, Inc. v. Hale*, 463 U.S. 491, 497 n 5. (1983).

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STATEMENT OF THE CASE

The 13 named plaintiffs are Teamsters who describe themselves as "route sales persons" or "driver-sales persons." (CP 46 ¶ 3.1; CP 56.) They drive bread trucks in Spokane and Yakima from which they sell bakery products to grocery stores and other customers. They work for defendant United States Bakery under collective bargaining agreements negotiated by the Teamsters.

These 13 plaintiffs are dissatisfied with one of the terms and conditions of employment that their bargaining agent negotiated for them. They are classified as "outside salesmen," and as a result they are not entitled to time-and-a-half pay for overtime hours. (CP 425-26 ¶ 17a.) "Outside salesmen" are exempt under the overtime laws of most states,[1] including Washington.

These 13 plaintiffs deny they are "outside salesmen," their collective bargaining agreements notwithstanding. Consequently they claim they have a statutory right to time-and-a-half pay for overtime hours. They brought this action in Washington state court for overtime pay, and for an injunction.

In bringing this action, plaintiffs introduced into state court a controversy that has occupied the collective bargaining process for more than 10 years. Whether these Teamsters route sales persons meet the definition of

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[1] Presumably because the Washington statute, like the statutes of other states, is derived from the equivalent federal provision of the Fair Labor Standards Act, 29 U.S.C. § 213(a)(1). Similarly, the Washington definition of "outside salesman" (App. J), like the definitions in other states, is patterned after the federal definition in 29 C.F.R. § 541.500.

"outside salesmen" has been addressed at length during each of the last four negotiations for the collective bargaining agreements. The Teamsters spent much time evaluating the nature of their duties and their compensation before concluding that they were indeed "outside salesmen." (*See, e.g.,* CP 417 ¶ 5; 422 ¶ 12; 424 ¶¶ 15-16.) The issue was the subject of a statewide meeting of Teamsters local representatives. (CP 418 ¶ 6-8.) The Teamsters also referred the issue to their national leadership, which concurred with the "outside salesmen" conclusion. (CP 418-19, ¶ 7.)

Most of plaintiffs' co-workers apparently prefer it this way---at least they ratified each of the collective bargaining agreements that so provide. Although they don't get statutory overtime pay, they obtain other benefits that aren't available to straight hourly workers. They get a measure of control over their hours and their income. They can choose whether to work longer hours on their routes for more commissions, or shorter hours for lower commissions. (*See, e.g.,* CP 420-21 ¶ 8c.) The Teamsters bargained on their behalf to bolster the commission system rather than to replace it with an hourly wage system. (*See, e.g.,* CP 420 ¶ 8; CP 542.)

In this action plaintiffs seek to overturn that collective bargaining result in state court. They seek an injunction against it not only for themselves, but also for hundreds of their fellow route sales persons, including those who voted for it. (Second Amended Complaint ¶ 3.1)

Petitioner United States Bakery moved to dismiss the action on the ground of federal pre-emption. (*See* Memorandum in Support of Summary Judgment.) The trial judge agreed. (App. B.) In order for him to decide the ultimate issue in the case---whether plaintiffs were "outside salesmen"---he acknowledged that he would have to

interpret the collective bargaining agreement. That is because Washington law (like most states) called for an inquiry into several factors that depended upon the collective bargaining agreements for their resolution: (1) the "purpose" of the employment; (2) whether plaintiffs or petitioner had "control" over plaintiffs' total hours; (3) whether plaintiffs' deliveries of bakery products were "incidental" to their sales; (4) whether plaintiffs had been advised of their status as "outside salesmen." (*See* definition of "outside salesman" at App. J.)

To ascertain the "purpose" of an employment, for example, one would naturally consult the employment contract, which in this case was a collectively bargained employment agreement. The trial judge articulated a dozen or so other ways in which he would have to interpret the collective bargaining agreement and its history in order to decide whether these plaintiffs were "outside salesmen" or not. (App. B-4 *et seq.*)

The trial judge concluded that the decisions of this Court pre-empted him from interpreting the collective bargaining agreements. (App. B-9.) It was therefore for plaintiffs to resort instead to the arbitration process specified in their agreements. (App. B-9.)

The Washington Court of Appeals reversed. In doing so, it attempted to finesse the pre-emption question. It held that the trial court need not even consider the collective bargaining agreements. (App. 6.) To ascertain the "purpose" of the employment, for example, the trial court would simply look to other evidence. For example, the trial court "need only consider evidence as to their job duties." (App. A-6.)

The Washington Supreme Court denied review. The case was remanded for trial.

REASONS FOR GRANTING THE WRIT

The trial court was right to hold this action pre-empted by federal labor law, and the Washington Court of Appeals was wrong to reverse that decision. Plaintiffs should have first pursued their remedy in arbitration. The decision of the Washington Court of Appeals is in acute conflict with federal labor law.

Plaintiffs' state law claim is a head-on challenge to the collective bargaining process. Plaintiffs seek to overturn a result that their own bargaining representative consciously chose on their behalf, that the employer agreed to, and that their co-workers ratified. Furthermore, what plaintiffs attack is not a peripheral aspect of the collective bargaining agreements, but their very core: wages, hours, terms and conditions of employment for hundreds of workers.

The existing conflict between this state court lawsuit and the collective bargaining process is disastrous, no matter how the lawsuit may eventually come out. This lawsuit was filed over three years ago, and obviously has years of life left in it.[2] Since the time it was filed, the existing collective bargaining agreements have expired or are expiring. The shadow of this lawsuit hangs over the current bargaining process for new contracts, for the lawsuit explicitly seeks to enjoin the historical method the

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2 If this Court does not accept certiorari, the next event in the trial court presumably will be to decide whether to certify it as a class action. It is ironic that these plaintiffs declare themselves the representatives of a class consisting of hundreds of their fellow route sales persons, when their fellow co-workers explicitly voted for the *Teamsters* to act as their representative on just such issues.

Teamsters and the Washington bakeries agreed upon to compensate hundreds of route sales drivers. The bargaining parties simply don't know what to do about it now in negotiating the next contracts.[3] They have struggled to articulate complex alternatives that take account of the different ways this lawsuit might come out, but these have failed. Since these negotiations effectively take place on a regional or statewide basis,[4] the labor contracts for Teamsters-organized bakeries in the state of Washington are currently hostage to this lawsuit.

This Court should not misunderstand our argument. We do not here contend that these collective bargaining agreements should override any state-created right to overtime pay that plaintiffs may have possessed. We acknowledge that such a right cannot be bargained away. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 740 (1981).[5] If the state wage-and-hour law provided,

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3 We are here going a little beyond the record, but that is because the launching of the current negotiations has occurred since the record below was closed. The uncertainty in the current negotiations, however, is well known. In any event, what *is* in the record already is sufficient in itself to support our point. After all, this record does at least show that the time is expiring for the existing collective bargaining contracts, and that the legal dispute about the validity of a key and historic provision is currently up in the air for the indefinite future.

4 Through the technique of pattern bargaining. The first contracts that are negotiated then become a pattern for the rest of the contracts.

5 It is significant, however, that the plaintiff in *Barrentine* did pursue his arbitration remedy. *Barrentine* therefore does not stand for the proposition that a plaintiff may spurn a remedy in arbitration and then file a lawsuit. *Id.* At 741 n 19.

for example, that *all* workers must be paid overtime after 40 hours, we acknowledge that any collective bargaining agreement to the contrary would yield.

But the conflict in this case between the state interest and the federal interest is not that simplistic, although simplistic is how the Washington Court of Appeals unfortunately saw it. For the Court of Appeals, the state statutory interest was paramount; therefore the federal interest in upholding the collective bargaining process must simply yield. In so ruling, the Court of Appeals seriously misconceived the federal right that it was trampling, and thereby trampled it unnecessarily.

I. The Washington Court of Appeals decided an important federal question in a way that conflicts with the decisions of this Court. The Court of Appeals refused to require plaintiffs to arbitrate, thereby ignoring federal pre-emption of plaintiffs' state court claim pursuant to § 301 of the Labor Management Relations Act.

One of the federally protected interests thus trampled was the interest in having disputes about the interpretation of a collective bargaining agreement addressed in arbitration, at least in the first instance. The resolution of plaintiffs' claim in this case does involve a dispute about the interpretation of the collective bargaining agreements. The state statute on which plaintiffs rely provides that whether plaintiffs have any right to overtime pay at all depends, at least in part, on what the Teamsters and the bakery had decided in collective bargaining. To be specific, plaintiffs' claim to overtime pay pursuant to the state statute explicitly depends on who has "control" over

their hours, on the "purpose" of their employment, on what duties are "incidental" to that purpose. (*See* App. I and J.) These are all terms and conditions of employment that can be bargained about, and were.

When a state law claim calls for interpretation of a collective bargaining agreement, this Court has held that it is pre-empted by § 301 of the Labor Management Relations Act. (App. G.)

First, this Court held that a laid-off employee's contract claim in state court for severance pay pursuant to the collective bargaining agreement is pre-empted by § 301, and he must instead follow the grievance and arbitration procedure. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965).

Next, the Court extended the rule to pre-empt an employee's state law tort claim for bad-faith handling of a disability insurance claim, because the state court would have to interpret the collective bargaining agreement in order to ascertain the duty of the insurer and employer. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 218 (1985). This, said the Court, would undermine the effectiveness of arbitration:

> "The parties here have agreed that a neutral arbitrator will be responsible, in the first instance, for interpreting the meaning of their contract. Unless this suit is pre-empted, their federal right to decide who is to resolve contract disputes will be lost.
>
> * * * Claims involving vacation or *overtime pay*, work assignment, unfair discharge---in short, the whole range of disputes traditionally resolved through

> arbitration---could be brought in the first instance in state court by a complaint in tort rather than in contract. A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness ... as well as eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance."

Id. at 219-20 (emphasis added).

In the same vein was *Electrical Workers v. Hechler*, 481 U.S. 851 (1987) (where "the threshold inquiry for determining if a [tort] cause of action exists is an examination of the contract to ascertain what duties were accepted by each of the parties and the scope of those duties," § 301 preempted the claim); *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 405 n. 4 (1988).

To be sure, none of these cases involved a state law claim of the kind involved in this case, i.e. a claim based on a "nonnegotiable" right. *See Livadas v. Bradshaw*, 512 U.S. 107, 122-23 (1994). The Court did deal with just such a "nonnegotiable" claim---a claim for wrongful discharge for exercising rights under the state's Workers' Compensation Act---and held that it was *not* pre-empted. *Lingle*, 486 U.S. 399. *Lingle*, however, does not undermine the principle on which we rely, for the plaintiff's claim in *Lingle* did not "require...a court to interpret any term of a collective bargaining agreement." *Id.* at 407.

The Court has not yet confronted a case like ours. In the *Lingle* opinion, however, the Court explicitly foresaw our case, and declared how it should come out:

> "It is conceivable that a State could create a remedy that, although nonnegotiable, nonetheless turned on the interpretation of a collective-bargaining agreement for its application. *Such a remedy would be preempted by § 301.*"

Id. at 407 n 7 (emphasis added).

The quotation above is our case. On the one hand, the state created a nonnegotiable remedy: a claim to recover overtime pay. (App. H, K.) On the other hand, whether these plaintiffs have a right to overtime pay in the first place depends on the interpretation of their collective bargaining agreements. It depends on who has "control" over their hours, the "purpose" of their employment, what are the "incidental" duties---and all these are matters of collective bargaining. (App. I, J.)

The Washington Court of Appeals, however, refused to follow this Court's statement in *Lingle* that just such a claim would be pre-empted. This Court should grant certiorari because the Court of Appeals decided an important federal question in a way that conflicts with relevant decisions of this Court.

There is a second distinct reason why this dispute should have gone to arbitration. The grain of sand at the center of this proceeding is the dissatisfaction of these 13 plaintiffs with the circumstances of their jobs: they claimed they did very little selling, and that they were essentially delivery people. (*See, e.g.,* App. B-5.) This kind of dissatisfaction with one's job is the quintessential grist for

the grievance and arbitration process, a process that sometimes can nip disputes in the bud. If plaintiffs had simply filed grievances that their actual assignments did not conform to what had been negotiated for them as "outside salesmen" (CP 425-26 ¶ 17a), this case might never have arisen. There may have been other, simpler ways to remedy their dissatisfaction. (*See* App. L for one of the grievance and arbitration procedures.) In any event, the collective bargaining agreements contained provisions for *non*-sales drivers who received an hourly rate that *did* qualify for overtime. (CP 546.)

Instead of a simple grievance and arbitration procedure, we now have a three-year old proposed class action lawsuit on behalf of *all* route salesmen, with years of additional litigation in store and the threat of an injunction at the end, massive uncertainty within the industry about what to do now, and frayed relations between union and management struggling to solve a problem that has been blown out of proportion.

This Court once summarized the function of the grievance and arbitration process as follows:

> "[T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties...The grievance procedure is, in other words, a part of the continuous collective bargaining process."

United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 581-82 (1960).

What these plaintiffs did in filing this action, and what the Court of Appeals did in letting it continue on, is to sabotage that "continuous collective bargaining process" that this Court described above. If the Court of Appeals had honored the paramount federal interest in enforcing the grievance and arbitration procedure, both union and management might know by now what the new contracts for the route sales persons should provide. As it is, everyone will have to wait years for the verdict.

II. The Washington Court of Appeals decision conflicts in another important way with the decisions of this Court. It conflicts with the National Labor Relations Act by crippling the defense of a unionized employer.

There were several different ways the Court of Appeals could have resolved this dispute. It could have agreed with our position stated above. Or it could have rejected our position and held that plaintiffs' claim was not pre-empted, thus permitting the trial court to interpret the collective bargaining agreements.[6]

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6 A different possibility suggested by this Court's opinions is a modified version of pre-emption: plaintiffs might be required to try arbitration first, with the right to pursue their claim in state court later if arbitration failed. *See, e.g., Livadas*, 512 U.S. at 124 n 18 ("Holding the plaintiff's cause of action substantively extinguished may not, as *amicus* AFL-CIO observes, always be the only means of vindicating the arbitrator's primacy as bargained-for contract interpreter.") Plaintiff might be required

(Footnote Continued)

But the Court of Appeals found yet another solution: ignore the collective bargaining agreements altogether. Since the trial court will not be interpreting them, the Court of Appeals apparently thought it won't run afoul of federal pre-emption.

Of all the ways the Court of Appeals could have resolved the dispute, this is the worst. It is a cure that is worse than the sickness. It creates a greater threat to the federal interest than any other option.

To appreciate why this is so, consider as an example the question of the "purpose" of plaintiffs' employment. The outcome of this case may turn on the trial court's evaluation of that purpose---whether it is "outside sales," or not. If the trial court were allowed to interpret the collective bargaining agreements, it might well conclude that the purpose of plaintiffs' employment is indeed "outside sales." That, after all, is what the collective bargaining agreements say. But if the trial court *doesn't* consider the collective bargaining agreements---if it restricts itself to evidence of plaintiffs' "job duties," as the Court of Appeals suggested ---- it might well conclude from that limited evidence that the purpose of their employment is *not* "outside sales." That, after all, is what these plaintiffs would testify. (App. B-5.) The trial court would then conclude that they aren't outside salesmen and would enjoin their compensation system, thus gutting that part of the collective bargaining agreements.

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to go first to arbitration to resolve any part of the claim that required arbitration, without necessarily losing the right to pursue the claim in state court later. *Barrentine*, 450 U.S. at 741 n 19 ("[W]e assume without deciding that a court should defer to a prior arbitral decision construing the relevant provisions of the collective-bargaining agreement.") This may be an appropriate procedure in this case.

The trial court which thus acts in intentional blindness to the existence and terms of the collective bargaining agreements is therefore a worse threat to the federal interest in collective bargaining than the trial court which at least tries to correctly interpret the collective bargaining agreements.

The federal pre-emption policy is like an airport rule that one aircraft must stay clear of the other to avoid collision. The Court of Appeals' application of that rule is to have the one aircraft pretend the other isn't there. If you just shut your eyes and don't look at it, you can't hit it.

The Court of Appeals missed the whole point of federal pre-emption. The ultimate object of federal pre-emption policy is not to keep collective bargaining agreements out of evidence in state court proceedings. It is to keep state courts from unnecessary interference with the collective bargaining agreements. If this state court should later enjoin the route sales persons' compensation system, it will be no consolation that it did so without knowing that it was thereby enjoining a feature of a collective bargaining agreement.

The Court of Appeals' decision therefore calls for the invocation of a second pre-emption doctrine in addition to § 301 pre-emption, a doctrine that this Court articulated pursuant to the National Labor Relations Act. This second pre-emption doctrine prevents a state from imposing an unequal burden on unionized employees. *Livadas*, 512 at 117 n 11, 132. Just as surely it must prevent a state from imposing an unequal burden on a unionized employer.

Our best evidence in defense in this case is the collective bargaining agreements and their history. We have already introduced them into the record. (*See, e.g.*, CP 517 et seq.) If the trial court refuses to consider them,

defendant's defense will be crippled. By contrast, a non-union bakery would be free to use its employment agreements as evidence in its defense. For the Court of Appeals to exclude an employer's best evidence because the employer has the misfortune to be unionized is an unwarranted state interference with collective bargaining that should be pre-empted by the National Labor Relations Act.[7]

III. There is a conflict among the state courts and the federal courts whether this claim is pre-empted under § 301.

The decisions of the lower courts, state and federal, are in conflict about how to apply § 301 pre-emption. They diverge in how to apply the terms "nonnegotiable" and "independent" as used by the Court in the following statement:

> "§ 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law, and * * * it is the legal character of a claim as

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[7] To be sure, the Court of Appeals did not say in so many words that defendant's evidence of the collective bargaining agreements should be excluded when offered. It held instead that the trial court "need only consider" other evidence. (App. A–6 .) The only other way to interpret this, however, is that plaintiffs don't have to rely on the collective bargaining agreements to prove their case, but defendant can rely on them if it wants to. This would amount to a trivial and nonsensical interpretation of the § 301 pre-emption doctrine: that is, federal policy is offended if the collective bargaining agreements are introduced into evidence by plaintiffs, but not if they are introduced by defendant.

> 'independent' of rights under the collective bargaining agreement * * * that decides whether a state law claim may go forward."

Livadas, 512 U.S. at 123.

Jurisdictions like Washington and New Mexico interpret these terms to pre-empt only those claims that are based on the collective bargaining agreement itself. *See Self v. United Parcel Service, Inc.*, 126 N.M. 396, 970 P.2d 582 (1998). These jurisdictions interpret "independent" to mean a claim that may be brought by an individual who is not a member of the collective bargaining unit, i.e. a claim not based on the collective bargaining agreement. A court need only consider the type of claim to determine whether it is pre-empted: if it is not contract-based, it is not pre-empted.

In contrast, federal Courts of Appeal have held that pre-emption does not depend purely on the type of claim, but on whether the claim calls for an interpretation of a collective bargaining agreement. The Seventh Circuit is in this camp. *Atchley v. Heritage Cable Vision Associates*, 101 F.3d 495, 501 (7th Cir. 1996) (statutory claim for failure to timely pay wages turned on the interpretation of the collective bargaining agreement and was pre-empted, even though the remedy was nonnegotiable). The Fourth Circuit appears to be in the same camp. *McCormick v. AT & T Technologies, Inc.*, 934 F.2d 531 (4th Cir. 1991) (state law claim for intentional infliction of emotional distress pre-empted because it requires recourse to the collective bargaining agreement to determine the standard of behavior.)

This Court has acknowledged that all is not clear in the lower courts, and that there is a conflict in how to interpret the pre-emption standard. *Livadas*, 512 U.S. at

124 n 18. The Court has also observed that "The full scope of the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis." *Lueck*, 471 U.S. at 220-21. This petition provides a needed opportunity.[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[8] Plaintiffs will presumably argue that this Court's recent decision in *Wright v. Universal Maritime Service Corp.*, __ U.S. __, 119 S.Ct. 391 (1998) supports their position. It does not, for several reasons. The most obvious is that *Wright* did not involve any interpretation of a collective bargaining agreement. Neither did the plaintiff in *Wright* seek to vitiate a core provision of the collective bargaining agreement.

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Item Submitted Pursuant to Rule 14.1(i)(vi)

APPENDIX L

Arbitration clause applicable to 12 of the 13 plaintiffs L-1

APPENDIX A

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

JOHN SCHNEIDER, KEVIN CRAWFORD, ROY R. CLARK, MIKE EDGAR, LEE HENDRICKSON, MARK C. JORDAN, RON LAMP, TERRY MOORE, KEITH NONNENMACHER, CAL PAULUS, TOM STONE, JOE WURTZ and ROBERT J. FILLIUM, individually and on behalf of the Class,	)	No. 17312-7-III
Appellants, v. SNYDER'S FOODS, INC., a Washington Corporation,	)	Division Three Panel One
Defendant.	)	
UNITED STATES BAKERY, INC., d/b/a SNYDER'S BAKERY, INC., a foreign corporation,	)	PUBLISHED OPINION* FILED MARCH 30, 1999
Respondent.	)	

KATO, J. – Route drivers for Snyder's Bakery, Inc., appeal the summary judgment dismissal of their overtime wage claims. We reverse.

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*[Note by petitioner's counsel:] Published by order of May 4, 1999. This opinion was originally designated as an "Unpublished Opinion," but publication was ordered after appellants argued that it was a significant decision.

John Schneider and 12 other employees of United States Bakery d/b/a Snyder's Bakery, Inc., (Snyder's) filed a class action lawsuit against their employer for unpaid overtime compensation. All the employees are route drivers who receive a commission on their individual sales plus a fixed salary. They are members of the Teamsters Union, which has a collective bargaining agreement with Snyder's that classifies route drivers as exempt salesmen. The complaint alleges that despite their working in excess of 40 hours a week, they have not received overtime as required by RCW 49.46.

Snyder's asserted these affirmative defenses: (1) failure to state a claim upon which relief can be granted, (2) statute of limitations, (3) preemption by the Labor Management Relations Act of 1947 (LMRA), and (4) failure to exhaust administrative remedies. Claiming the LMRA preempted the overtime claims, Snyder's moved for summary judgment. The court agreed and granted summary judgment dismissal. This appeal followed.

We review an order of summary judgment by engaging in the same inquiry as the trial court. *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 123, 839 P.2d 314 (1992). An order of summary judgment is appropriate when there is no genuine issue of material fact. CR 56(c); *Ervin v. Columbia Distributing , Inc.*, 84 Wn. App. 882, 886, 930 P.2d 947 (1997). The court must consider the facts in the light most favorable to the nonmoving party. *Id.* Summary judgment is appropriate only if, after considering all the evidence, reasonable persons could reach but one conclusion. *Commodore,* 120 Wn.2d at 123.

The route drivers contend they were entitled to overtime compensation pursuant to RCW 49.46, the Minimum Wage Act (MWA). Snyder's argues these claims

were properly dismissed because they are preempted by the LMRA. Although federal law does not generally preempt the MWA, section 301 of the LMRA, 29 U.S.C.A. § 185 (West Supp. 1978), authorizes federal courts to resolve disputes involving collective bargaining agreements. *Ervin,* 84 Wn. App. at 888-89. Section 301 preempts the application of state law to interpret or enforce these bargaining agreements. *Commodore,* 120 Wn.2d at 126. Only those claims which are founded directly on rights created by a collective bargaining agreement and those substantially dependent upon construction of the agreement are governed by section 301. *United Food & Commercial Workers Union Local I00I v. Mutual Benefit Life Ins. Co* , 84 Wn. App. 47, 51, 925 P.2d 212 (1996), *review denied,* 133 Wn.2d 1021 (1997). Federal law does not preempt claims based upon state law when the law grants employees nonnegotiable substantive rights and when adjudication of those rights does not depend on the collective bargaining agreement. *Id.*

Rights established by state law are nonnegotiable when they cannot be waived, alienated, or altered by private agreement. *Id.* at 51. The MWA establishes a minimum standard for wages and working conditions for all employees. *Id.* (citing RCW 49.46.120). Under the MWA, employees have the right to overtime when they work more than 40 hours a week. RCW 49.46.130. In enacting these protections, the Legislature has stated that collective bargaining agreements may establish wages or other work conditions only in excess of the statutory minimums. RCW 49.46.110; *United Food & Commercial Workers,* 84 Wn. App. at 52, Accordingly, the rights provided by the MWA may not be waived by a collective bargaining agreement. *Ervin,* 84 Wn. App. at 891.

When a state law claim is independent or does not require interpretation of the collective bargaining

agreement, section 301 does not preempt the claim. A state claim is independent of a collective bargaining agreement if it can be asserted without reliance on an employment contract. *Commodore,* 120 Wn.2d at 130-31; *Ervin,* 84 Wn. App. at 889.

This court in *Ervin* determined that claims under the MWA are not preempted by section 301. *Ervin,* 84 Wn. App. at 888. Mr. Ervin sought unpaid overtime from his employer. At the beginning of his employment, he was advised that his employer would not pay overtime wages. The union contract guaranteed him 40 hours' pay each week. Mr. Ervin did not work fewer than 8 hours in a day and began keeping track of the number of hours he worked. The collective bargaining agreement provided for time-and-a-half pay for hours worked in excess of 10 in a day or 40 in a week. Mr. Ervin quit his job and filed suit seeking overtime compensation.

On the employer's motion for summary judgment, the trial court dismissed the complaint. *Id.* at 886. On appeal, this court determined Mr. Ervin's claim was not preempted by section 301 because he could assert his claims without relying on the collective bargaining agreement. *Id.* at 890. The court stated that the rights provided by the MWA could not be waived or altered by a collective bargaining agreement and employees were not required to arbitrate these "nonnegotiable" claims. *Id.* at 891.

The general preference for arbitration was outweighed by the statutory requirements of the MWA and the strong public policy against depriving union employees of statutory rights that would be available to nonunion employees. *Id.*

Here, like *Ervin,* the route drivers brought an action for unpaid overtime under the MWA. They can assert this claim without relying on the collective bargaining agreement. If the claims were preempted, they would be forced to arbitrate in violation of public policy since these union employees would be deprived of rights afforded to their nonunion counterparts. The court erred by granting summary judgment dismissal based on preemption.

Snyder's argues summary judgment was nonetheless appropriate because the court must interpret the collective bargaining agreement in order to determine if the route drivers are entitled to overtime. RCW 49.46.130 provides that, except for persons exempted under RCW 49.46.010(5) as outside salesmen, any employee who works more than 40 hours a week is entitled to overtime. Snyder's claims the route drivers are outside salesmen pursuant to RCW 49.46.010(5)(c) and are thus exempted from overtime. The statute defers to the rules of the director of labor and industries to define and delimit the term "outside salesman."

WAC 296-128-540 defines an outside salesman as any employee:

(1) Who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business, as well as on the premises (where the employee regulates his own hours and the employer has no control over the total number of hours worked) in the following alternative activities:

(a) In making sales; including any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition; or

(b) In obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; or

(c) In demonstrating products or equipment for sale; or

(d) In the sale of services and performance of the service sold when the compensation to the employee is computed on a commission basis; and

(2) Whose hours of work of a nature other than that described in (1)(a), (b), (c) and (d) of this section do not exceed 20 percent of the hours worked in the work week by nonexempt employees of the employer: Provided, That work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work; and

(3) Who is compensated by the employer on a guaranteed salary, commission or fee basis and who is advised of his status as "outside salesman."

If the route drivers meet the definition of outside salesmen, they would not be entitled to overtime compensation. Snyder's claims the court cannot determine if they fall under this definition without interpreting the collective bargaining agreement. But the court need not interpret the collective bargaining agreement to make that determination. The court need only consider evidence as to their job duties. In any event determining whether the route drivers are indeed outside salesmen involves genuine

issues of fact which cannot be resolved by summary judgment. *See Ervin,* 84 Wn. App. at 894-95.

Reversed.

/s/_____
Kato, J

WE CONCUR:

/s/_____
Sweeney, A.C.J

/s/_____

Brown, J.

APPENDIX B

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

JOHN SCHNEIDER, KEVIN CRAWFORD, ROY R. CLARK, MIKE EDGAR, LEE HENDRICKSON, MARK C. JORDAN, RON LAMP, TERRY MOORE, KEITH NONNENMACHER, CAL PAULUS, TOM STONE, JOE WURTZ and ROBERT J. FILLIUM, individually and on behalf of the Class,	)	Civil No. 96-2-02446-4
Plaintiffs,	)	
v.	)	
SNYDER'S FOODS, INC., a Washington Corporation, and UNITED STATES BAKERY, INC., d/b/a SNYDER'S BAKERY, INC., a foreign corporation,	)	
Defendants.	)	

VERBATIM REPORT OF PROCEEDINGS
ORAL OPINION
THE HONORABLE MICHAEL W. LEAVITT
Yakima, Washington
January 9, 1998

(In Open Court)

THE COURT: Thank you. As I indicated when we started, I have read the submissions by both sides. And including the collective bargaining agreement, trying to get a flavor for them and what was referenced in those documents. And also because they were referenced by both sides in your briefing.

Really, the ultimate issue in this case is going to be whether or not the plaintiffs are outside salesmen under the provisions of RCW 49.46.010(5)(c), which really only says that if you are – the definition of employee defines that as, I can't remember exactly the words, but one of the terms is if you are an outside salesman then it references that term as defined by the director and limited by the director. So you go to the [Washington Administrative Code] then and the WAC sets forth a specific definition under 296-128-540, very specifically a number of items that comprise the definition of outside salesmen.

In fact, there are three paragraphs, [1] which contains the four subdivisions, and paragraph (2) and paragraph (3).* The first one being whether or not the person is employed for the purpose of and who is customarily and regularly engaged away from the business of his employer and involved in the following activities and then it states four different types of activities in the alternative.

(2), is relative to the percent of hours worked in the work week by the nonexempt employee, being not exceeding 20 percent of those activities specified in No. (1), (a), (b), (c), or (d). Provided that the work

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*[Note by petitioner's counsel:] Reproduced at App J-1 below.

performed is not incidental to or in conjunction with those activities. So that is a separate thing that the court would look at. And then (3) is whether the nature of compensation, whether it's on a guaranteed salary, commission, or fee basis. And then also if the person has been advised of their status as outside salesman, in quotes.

Now that's [how] the [Washington Administration Code] defines this term. Ultimately that is the issue that has to be decided on this claim, because once that issue is defined, it seems to me that the steps are very clear. I mean very clear. And if in fact these plaintiffs are not exempt, I mean it is very clear then we find out the number of hours and the rate of pay and apply that, period. So the central issue ultimately is are they outside salesmen?

Now the issue for this hearing on this summary judgment is whether or not this court, or a court in the state jurisdiction in looking at the issue of outside salesmen would need to look to the [collective bargaining agreement] to make that determination, or whether that determination could be made independent of the collective bargaining agreement?

Now, since I look at the provisions of the [Washington Administrative Code], you look at the activities performed, you look at whether they have been advised that they are considered outside salesmen, that's in the provision specifically. Whether they function away from the employer's place of business. Whether the employer controls the total hours worked in other areas. How they are compensated and those kinds of things. And so can a court then sitting here and reviewing these factors, and the definition set forth in the [Washington Administrative Code], determine those issues without looking to the provisions of the [collective bargaining agreement]? And I ask myself this question, would the

court need to understand and analyze why the parties to a collective bargaining agreement, specifically the one [that] specifically agrees that they are outside salesmen, would the court need to analyze that? What role or what effect does that have in making that determination? Is it relevant?

Clearly you would think it is relevant evidence that could be submitted. Is it the only evidence? No, I mean there are a number of provisions in the [Washington Administrative Code] that would indicate there are a number of things you are looking at, so that is not the only thing, but that is something there. What information was considered by the union representative and the employer in making that determination? Does the court need to know that? If I need to know that, aren't I really analyzing then and construing the collective bargaining agreement? If I don't need to know that, what role would the collective bargaining agreement play? If this issue was decided independently would that decision have an impact on the construction, interpretation, or application of a collective bargaining agreement?

I think that's another question I have to ask myself and I have asked myself as I have gone through this. Because frankly, the quality of the briefing here has been very, very good. And I have gone back and forth on this as I have gone through and studied this issue. But finally as I have been able to get this in focus as to what we are really focusing on here in this hearing, it is--it has helped to put that in focus and clearly analyze it in the sense of what is the issue here and does the court need to look at the [collective bargaining agreement], or can this be determined independent of the [collective bargaining agreement]? I asked my question, wouldn't the court have to analyze why the collective bargaining agreements create different categories of jobs, including the driver, delivery men who are paid overtime and that's provided in the

collective bargaining agreement. And why the category, that category is different from an outside salesman, who is on commission with the base. There is a provision in the collective bargaining agreement that provides that the employer may distribute private or secondary legal products to fast food accounts, by either hourly rated drivers or using outside salesmen on a commission, that's a provision in there. I am aware of the commission of the plaintiffs, really their service and the activities, the things that they are doing substantially are that they are delivering product and that's it, they are not selling. How do I, how do I put all this together when I have provisions in an agreement that says that they can be distributed through hourly paid people, or through outside salespeople and these plaintiffs are all outside salespeople, yet they are, there is a provision the company could use hourly rated people. So what is the purpose of having that there and how does that fit with the category, that of outside salespeople? Why the difference in the agreement?

Those are questions that I have asked as I have gone through this. As I pointed out here, the plaintiffs claim that essentially they are delivery people. They do very little sales work. They deliver to accounts that have been in existence. They sell product, but the bulk of their work that's done is delivery work. And so the court would ask the question, can I make a determination as to that issue without understanding the considerations or the analysis that went into those distinctions that are set forth in the collective bargaining agreements? If the court is, if that's necessary to do that, isn't the court then analyzing or construing the collective bargaining agreements? It would seem to me that I would be doing that if that was a necessary element in this consideration.

I ask, is there a significance, is there significance to the fact that the collective bargaining agreements contain

provisions about inside salesmen, have an inside salesman provision and pay with respect to that? And what is the distinction between those positions, an outside salesmen, and was there any discussion what was the purpose for that as we analyze the activities and the duties of the plaintiffs, because ultimately that is one of the key factors as set forth in the [Washington Administrative Code]. What's the significant of the collective bargaining agreement containing a noncompete clause for outside salesmen only? And under none of the other categories is that a relevant fact to the determination as to this issue and the purpose of their employment, because I do think that under the [Washington Administrative Code] that the purpose is one of the considerations. Activity is clearly one of the considerations. Compensation, method of compensation is one of the considerations. Whether the plaintiffs were advised that they were outside salesmen is one of the considerations.

As to whether the plaintiffs were advised that they are outside, they are considered by the employer to be outside salesmen, what role does that statement in the Yakima agreement that they are considered outside salesmen have to play in that? Doesn't the court have to look at that? The court, can that be independent of the court's analysis of that issue? Why are overtime provisions contained in the collective bargaining agreements for other categories of workers except not for outside sales? Because it's clearly overtime is provided. And what analysis and consideration and negotiation discussions came into play with respect to that? And some of the other agreements that have been made here with respect to the give and take on some other things to increase what would appear to be the ability to increase their commissionability for products. Do those factors come into play in a determination of this issue by the court? If they do, clearly the [collective bargaining agreement]s have a significant

role, or at least are and are really intertwined with this whole analysis of whether or not the plaintiffs are outside salesmen.

I guess the question also came up to this court as I went through this, is what role did the plaintiffs play in interacting with their union representative in placing these provisions in the [collective bargaining agreement], or is this an admission of sorts with respect to that? Now I appreciate to you that is not by itself determinative of that issue. But again, it's a factor. It's out there and it has to be dealt with in the total analysis of everything that's going on. And if the court got into that, am I getting into again an analysis and a discussion and interpretation of the [collective bargaining agreement]? Would the plaintiffs in cross-examination in state court, would the defendant be entitled to ask them about those, those provisions? If they do, is that going into an interpretation of construction analysis of the [collective bargaining agreement]? What basis or authority would the court have not to allow that kind of an inquiry? I can't think of any. Because clearly that's relevant in the court's mind because it addresses this.

Now, if this court were to rule that the provisions of the [collective bargaining agreement] are independent of the plaintiff's claims here, then I ask myself what would the effect of those provisions of the [collective bargaining agreement] have, what would be the situation that would have the [collective bargaining agreement]s here, the court's ruling? Clearly the provision that these plaintiffs are outside salesmen, that would be avoided, that would be very clear, this court can't sit here and say after analysis that these folks are not outside salesmen, that [they] are not exempt, if we are going to proceed to find out, then their number of hours and apply their rate of pay and that is going to be their compensation. Clearly provisions regarding commissions and rate of pay would be impacted

as to these parties. I mean I don't know how else you could, I don't know how you could separate them. What weight should the court place on the fact that the legal and recognized bargaining agent for these plaintiffs had agreed to those provisions? Isn't that a consideration the court would have to make in this analysis of this issue? Clearly the provisions of the [collective bargaining agreement] could not be ignored in resolving the issues in this case. I don't see how I could, how any judge could go into this and not and ignore the fact that I have got collective bargaining agreements out there that speak to at least some of the factors that are set forth in the [Washington Administrative Code].

Now that doesn't mean that we're in any way impairing any of the rights of these parties. That does not make a distinction between the union and nonunion. I would not tolerate that one minute. Because the issue here before the court, the threshold issue itself that's got to be decided is are they an outside salesman and what are the factors that have to be looked into in order to determine that? And what are those factors? And can that determination be made independent of an analysis and construction of the collective bargaining agreements? I cannot see how it can be. I cannot see how it can be. It would seem to me that the collective bargaining agreements are so intertwined with that issue of whether or not the plaintiffs are outside salesmen, that it has, the collective bargaining agreements have to be analyzed and those provisions have to be reviewed, and an interpretation made as to what it is that those provisions made and what was the basis for those provisions even going into those agreements, what decisions took place, what role did the plaintiffs play in actually making those statements on having those provisions being there?

It would seem to me that that, this cannot be separated from the collective bargaining units, that issue, the determination of that issue and whether [they] are outside salesmen. Once that issue is decided, that decides in my mind really the key issue in this case. As I said, as we start out if in fact they are not exempt, it seems to me that some of the cases cited by the plaintiff relative to, I am trying to think of the word, the off clock, when the person would go off clock, I mean those kinds of issues can be clearly determined by what then transpired. But here we have, this is unique to all the cases cited by all the parties, we have collective bargaining agreements that even in fact refer to this issue. I don't believe and I am not suggesting here that the fact that the collective bargaining agreement denotes the plaintiffs as outside salesmen is dispositive of this issue, I am not inferring that. But I am stating very clearly that I believe that because the collective bargaining agreement makes that reference and sets up the mode of compensation and for these other purposes that I have stated, these other questions that seem to be intertwined with this issue that you cannot, a court cannot make a determination of that issue without referencing the collective bargaining agreements and at least construing or analyzing what is happening and what was intended and what was meant by those documents.

So for those, for that purpose, for those reasons, counsel, I am going to grant your motion with respect to the exemption. And as you know, that is not the end of this matter. That simply allows this decision to be made, provides for this decision to be made in a different forum. Counsel, you can present the court with an appropriate order.

MR. KOEHLER: I will do that, Your Honor, thank you.

THE COURT: Counsel, let me just again, I mentioned to both of you in the course of my discussion here that I appreciated very much that it was a lot, but it was well done. It focused the issue for me and that was very helpful to the court. It's a pleasure really to have well briefed issues. And I know that's no solace to one side or the other when they have a decision to be made, but at least is intended by this court to indicate the quality of the representation that you have given to your clients and I appreciate that. So, thank you both very much.

Is there anything further, Mr. Johnson?

MR. JOHNSON: Well, Your Honor, allow me to say that as Mr. Koehler had represented, Your Honor, in his final rebuttal remarks, that certainly while there may be disagreement between counsel here with Your Honor's decision, I do respect and appreciate the fact that the court has taken the time to read in great detail, not just the briefs, but the cases that are there and collective bargaining agreement. It's very clear Your Honor has an understanding of the matter and we do appreciate that.

THE COURT: Thank you, Mr. Johnson, I know these are difficult issues, it was a very difficult thing, I spent a lot of time on it, but that's my job. But again, I appreciate your efforts and both sides here are well represented, and there is quality representation here, I appreciate it.

Nothing else then, counsel, thank you very much. And the court is adjourned. You will present an order to me?

MR. KOEHLER: I will present an order and I will run it by plaintiff's counsel first.

THE COURT: If there is a problem about the form of the order we can do it by telephone conference if you would like to save a trip over. And I just offer that as a suggestion if you would like to do that.

MR. JOHNSON: Thank you, Your Honor.

THE COURT: Thank you, very much.

ADJOURNED

APPENDIX C

THE HONORABLE MICHAEL W. LEAVITT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THE COUNTY OF YAKIMA

JOHN SCHNEIDER, KEVIN CRAWFORD, ROY R. CLARK, MIKE EDGAR, LEE HENDRICKSON, MARK C. JORDAN, RON LAMP, TERRY MOORE, KEITH NONNENMACHER, CAL PAULUS, TOM STONE, JOE WURTZ and ROBERT J. FILLIUM, individually and on behalf of the Class, Plaintiffs, v. SNYDER'S FOODS, INC., a Washington Corporation, and UNITED STATES BAKERY, INC., d/b/a SNYDER'S BAKERY, INC., a foreign corporation, Defendants.	Civil No. 96-2-02446-4 **ORDER AND JUDGMENT OF DISMISSAL**

This Court heard Defendant United States Bakery's Motion for Summary Judgment on January 9, 1998. The Court had reviewed all the briefs and affidavits submitted by the parties, and heard argument of counsel. The Court finds that this case is preempted by the Sec. 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Now therefore,

IT IS HEREBY ORDERED that Defendant United States Bakery's Motion for Summary Judgment is GRANTED, and this case is DISMISSED with prejudice.

DATED this 18th day of February, 1998.

/s/_____
Michael W. Leavitt
Superior Court Judge

APPENDIX D

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

Division III

JOHN SCHNEIDER, KEVIN CRAWFORD, ROY R. CLARK, MIKE EDGAR, LEE HENDRICKSON, MARK C. JORDAN, RON LAMP, TERRY MOORE, KEITH NONNENMACHER, CAL PAULUS, TOM STONE, JOE WURTZ and ROBERT J. FILLIUM, individually and on behalf of the Class,	)	No. 17312-7-III
Appellants, v. SNYDER'S FOODS, INC., a Washington Corporation,	)	ORDER DENYING MOTION FOR RECONSIDER-ATION
Defendant.	)	
UNITED STATES BAKERY, INC., d/b/a SNYDER'S BAKERY, INC., a foreign corporation,	)	
Respondent.	)	

THE COURT has considered respondent's motion for reconsideration, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of March 30, 1999 is hereby denied.

DATED: May 4, 1999

FOR THE COURT: /s/_____
JOHN A. SCHULTHEIS
CHIEF JUDGE

APPENDIX E

THE SUPREME COURT OF WASHINGTON

JOHN SCHNEIDER, KEVIN CRAWFORD, ROY R. CLARK, MIKE EDGAR, LEE HENDRICKSON, MARK C. JORDAN, RON LAMP, TERRY MOORE, KEITH NONNENMACHER, CAL PAULUS, TOM STONE, JOE WURTZ and ROBERT J. FILLIUM, individually and on behalf of the Class, Respondents, v. SNYDER'S FOODS, INC., a Washington Corporation, Defendant. UNITED STATES BAKERY, INC., d/b/a SNYDER'S BAKERY, INC., a foreign corporation, Petitioner.	NO. 68146-5 **ORDER** C/A NO. 17312-7-III

Department II of the Court considered this matter at its November 2, 1999, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 2nd day of November, 1999.

/s/
RICHARD GUY
CHIEF JUSTICE

APPENDIX F

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

JOHN SCHNEIDER, KEVIN CRAWFORD, ROY R. CLARK, MIKE EDGAR, LEE HENDRICKSON, MARK C. JORDAN, RON LAMP, TERRY MOORE, KEITH NONNENMACHER, CAL PAULUS, TOM STONE, JOE WURTZ and ROBERT J. FILLIUM, individually and on behalf of the Class,	**MANDATE**
Appellants,	No. 17312-7-III
v.	Yakima County
SNYDER'S FOODS, INC., a Washington Corporation,	No. 96-2-02446-4
Defendant.	
UNITED STATES BAKERY, INC., d/b/a SNYDER'S BAKERY, INC., a foreign corporation,	
Respondent.	

The State of Washington to: The Superior Court of the State of Washington, in and for **Yakima** County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division III, filed on **March 30, 1999** became the decision terminating review of this court in the above-entitled case on **November 2, 1999**. The cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance

with the attached true copy of the opinion. **Costs in the amount of $849.25 are awarded to Appellant, to be paid by Respondent.**

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Spokane, this 15th day of November, 1999.

/s/ Patricia I. Crandall
Clerk of the Court of Appeals, State of Washington
Division III

APPENDIX G

29 U.S.C. § 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * *

APPENDIX H

RCW 49.46.130. Minimum rate of compensation for employment in excess of forty hour work week – Exceptions.

(1) Except as otherwise provided in this section, no employer shall employ any of his employees for a work week longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) This section does not apply to:

(a) Any person exempted pursuant to RCW 49.46.010(5) ["outside salesman" and others].*

* * *

* [Note by petitioner's counsel:] In 1997, the Washington Legislature added a sentence to this statute, but it has no direct bearing on this case. It was intended to overrule a Washington Court of Appeals decision. *Boykin v. Boeing Co.*, 128 F.3d 1279, 1282 (9th Cir. 1997).

APPENDIX I

RCW 49.46.010. Definitions.

As used in this chapter:

* * *

(5) "Employee" includes any individual employed by an employer but shall not include:

* * *

(c) Any individual employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesman as those terms are defined and delimited by rules of the director. However, those terms shall be defined and delimited by the Washington personnel resources board pursuant to chapter 41.06 RCW.

* * *

APPENDIX J

WAC 296-128-540 Outside salesman. The term "individual employed in the capacity of outside salesman" in RCW 49.46.010 (5)(c) shall mean any employee:

(1) Who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business, as well as on the premises (where the employee regulates his own hours and the employer has no control over the total number of hours worked) in the following alternative activities:

(a) In making sales; including any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition; or

* * *

(c) In demonstrating products or equipment for sale; or

* * *

(2) Whose hours of work of a nature other than that described in (1)(a) [and (c)] of this section do not exceed 20 percent of the hours worked in the work week by nonexempt employees of the employer: *Provided,* That work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work; and

(3) Who is compensated by the employer on a guaranteed salary, commission or fee basis and who is advised of his status as "outside salesman."

APPENDIX K

RCW 49.46.090. Payment of wages less than chapter requirements – Employer's liability – Assignment of wage claim.

(1) Any employer who pays any employee less than wages to which such employee is entitled under or by virtue of this chapter, shall be liable to such employee affected for the full amount of such wage rate, less any amount actually paid to such employee by the employer, and for costs and such reasonable attorney's fees as may be allowed by the court. Any agreement between such employee and the employer to work for less than such wage rate shall be no defense to such action.

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APPENDIX L

GRIEVANCE AND ARBITRATION CLAUSES

The following are the grievance and arbitration clauses of the most recent collective bargaining agreement that applies to 12 of the 13 named plaintiffs (CP 536-38):

ARTICLE 27 – SETTLEMENT OF GRIEVANCE

27.1 The Business Representative and the Manager of the bakery shall settle all grievances arising from causes of this Agreement and shall be binding to both parties. In the event the parties are unable to agree on a settlement, the grievance shall then be processed pursuant to the provisions of Article 30.

* * *

27.2 27.3 A dispute or grievance involving wage rates, overtime or other matters involving the pay of employees may be filed at any time, but retroactive compensation shall be limited to forty-five (45) calendar days preceding the date of filing with the Union.

ARTICLE 30 – ARBITRATION

27.3 Should differences arise between one or more Employers of the bakery industry and the Union, or its members employed by the Employer, as to the interpretation, construction and disputes of any nature of this Agreement, an earnest effort will be made by both parties to settle any differences immediately. If not settled within a ten (10) day time period, either party may notify the other party by letter that the matter be referred to a Joint Labor Relations Committee.

27.4 A joint Labor Relations Committee shall be organized for any and all bakeries operating under this Agreement and shall have authority to settle all controversies as to the interpretation, construction and disputes of any nature of this Agreement. * * *

* * *

27.5 The Joint Labor Relations Committee shall promptly arrange a conference and a decision shall be made not later than fifteen (15) working days, unless mutually agreed to the contrary by both parties. The decision of the Committee shall be binding on all parties involved.

* * *

27.6 30.7 It is understood and agreed that the above grievance procedure is adequate to settle all grievances as to the interpretation and construction of this Agreement[.] * * *